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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 73-474

UNITED STATES OF AMERICA
ex rel. FRANCIS C. SMITH
Petitioner

V.

CARL ROBINSON, Warden
Connecticut State Prison
Somers, Connecticut

JOHN R. MANSON, Commissioner
Connecticut Department
of Corrections
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANCIS C. SMITH
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Pro se

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The petitioner Francis C. Smith, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 26, 1973.

Opinion Below

The order and judgment of the United States Court of Appeals for the Second Circuit appears in the Appendix hereto, page 28. There was no opinion. The opinion of the U.S. District Court for Connecticut, not yet reported, appears in the Appendix hereto, page 25. The Supreme Court of Connecticut opinion, State V. Smith, 138 Conn. 196, appears in the Appendix hereto at pages 7, 8 - 15.

Jurisdiction

The judgment and order of the United States Court of Appeals for the Second Circuit was entered on June 26, 1973, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Questions Presented for Review

1. Whether on the facts of the case the conviction herein is constitutional under the 14th Amendment of the Constitution of the United States of America, and other amendments embraced thereby, when obtained and upheld on evidence knowingly allowed by the State Prosecutors to be falsely used with the jury to convict wrongfully on the trial.

2. Whether on the facts of this case the Connecticut Statute as used and applied herein is Constitutional under the 14th Amendment of the Constitution of the United States of America, and other amendments embraced thereby.

3. Whether on the facts of this case, the petitioner's Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil procedure, did the Courts below err in not giving judgment to the petitioner in view of the State Attorneys admission that the conviction had been obtained on evidence falsely used on the trial to convict.

4. Whether on the facts of this case the Federal Courts below denied jurisdiction and relief erroneously on the issues herein presented, where jurisdiction was predicated on the U.S. District Court's own records, and the conclusions stated in dismissing the petition were totally devoid of support in the record, and have and had nothing to do with a previous claim made on the sufficiency of the indictment.

5. Whether on the facts of this case the federal Courts below erroneously denied jurisdiction and relief on the claim that the state courts had violated the petitioner's constitutional rights in the manner in which the state statute involved was used and applied by them.

Sections of the Constitution of the United States Involved

6th Amendment

In all criminal prosecutions, the accused shall enjoy the right ++++ to be informed of the nature and cause of the accusation ++++.

14th Amendment

++++ No State ++++ shall ++++ deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections of the Constitution of the State of Connecticut Involved

Article First, Section Nine

++++ No person shall be holden to answer for any crime, the punishment of which may be death or life imprisonment, unless on a presentment or an indictment of a Grand Jury ++++.

Article First, Section Twenty-one

The right of trial by jury shall remain inviolate.

Article Second

The powers of government shall be divided into three distinct departments, and each of them confided to a serarate magistracy, to wit, those which are legislative, to one; those which are

executive, to another; and those which are judicial, to another.

(See Connecticut Constitution, Vol. I, Conn. Gen. Stats. Revision of 1949, pages 27, 30 and 31.)

Statute Involved

Section 8350 Connecticut General Statutes Revision of 1949, Vol. III, Page 3049.

All murder perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or committed in perpetrating or in attempting to perpetrate, any arson, rape, robbery or burglary, or injury to any person or property by means of any explosive compound, shall be murder in the first degree; and all other kinds of murder shall be murder in the second degree ++++.

Indictment Involved

To the Honorable Superior Court for the County of Fairfield, State of Connecticut, now in session at Bridgeport in said County, for the transaction of criminal business:

The Grand Jurors within and for said County accuse Francis Clifford Smith, of 35 Linden Avenue, Darien in said County, of murder in the first degree and charge, that on the 23rd day of July 1949, at Greenwich in said County, the said Francis Clifford Smith wilfuly, deliberately, with

premeditation and malice aforethought, did shoot and kill one Grover S. Hart, against the peace and contrary to the form of the statute in such case made and provided.

Oct. 4th 1949
a true Bill
David H. MacKenzie
Foreman Grand Jury

Federal Rules of Civil Procedure Involved

Rule 56 (a)

A party seeking to recover upon a claim ++++ may ++++ move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(e) ++++ When a motion for summary judgment is made as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond summary judgment, if appropriate, shall be entered against him.

Rule 15 (a)

A party may amend his pleading once ++++ before a responsive pleading is served ++++. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party.

Statement of the Case

The petitioner was indicted on Oct. 4, 1949, of murder in the first degree, and convicted and sentenced to death therefor on June 7, 1950, and later commuted to life imprisonment without pardon or parole on June 7, 1950.

The crime charged occured in the Indian Harbor Yacht Club in Greenwich, Connecticut on July 23, 1949. One Grover S. Hart was found shot and some .?? caliber cartridge cases were found in the vicinity. Grover S. Hart was night watchman.

Twenty-four hours later a co-defendant and the self-confessed killer in this case drove in a gray Cadillac to the Hollywood Cafe in Brewster New York, some fifty miles from Greenwich. He fled from the car in the presence of two New York state policemen, who searched the car and removed a .22 caliber Colt pistol, some ties and insignia sold at the said yacht club, and some property of club personell. This co-defendant, George Frankie Lowden, pleaded guilty to the killing in Nov. 1949 and was sentenced to life imprisonment, and paroled in 1966.

To convict this petitione the State sought on the trial to connect the petitioner by circumstantial evidence with Lowden at the said Hollywood Cafe in Brewster, New York. The State offered the testimony of two witnesses that they had seen the petitioner driving a gray Cadillac some two

months before the crime charged occured. One, an Edith Springer, later confessed perjury. She on the trial sought to place the petitioner in the gray Cadillac in which Lowden had gone to the Hollywood Cafe and which was stolen by Lowden sometime in late June 1949 while the petitioner had been driving a Cadillac sine sometime in the early month of May 1949 to the William Peatt resort in Ridgefield, Connecticut, who corroborated that the petitioner had pointed the car out a few feet away as a Fleetwood Cadillac, a different model than Lowden's. The Hollywood Cafe owner James Kane testified that he remembered seeing the petitioner in his Cafe sometime that summer but could not remember when. There was no evidence the petitioner drove a Cadillac after the Cadillac involved was stolen by Lowden, or that connected the petitioner to Lowden at any time or place. This case is totally devoid of evidentiary support as to the petitioner.

To attempt to make a case the State subpoenaed Lowden, who refused to testify. Because he had said he would tell the truth, the State claimed "surprise" on testimony it had brought upon itself in pressing for testimony. The State was then allowed to cross-examine him, and on this guise the State made its case out of its own mouth while Lowden denied it all, under oath of course. Under Connecticut law a party is bound by adverse tes-

timony adduced cross-examining his own witness.

In the charge to the petit jury they were instructed that if they found an "unlawful" act involved in the crime charged, a verdict of murder in the first degree was proper. This charge appears on page 2 of the Appendix. No instructions of any kind were given as to what at law was recognised as an unlawful act. The "law" was now what the jury found it to be, and whether a death penalty should be inflicted therefor, all State legislative enactment to the contrary notwithstanding, the whole body of the criminal law wiped out and nullified in one fell swoop, and placed in limbo. After a quick conviction, the State Supreme Court on appeal found that the articles removed from the Cadillac in Brewster, New York, justified a verdict of murder in the first degree as a killing in a theft. State V. Smith, 138 Conn. 196, 201.

In Connecticut a State Court may acquire jurisdiction to try a Capital case, or one where the punishment may be life imprisonment, only on a presentment or indictment of a Grand Jury. Connecticut Constitution, Article First, Section Nine (page 4 supra). The Grand Jury indicted contrary to the form of the statute in such case made and provided. This statute is Sec. 8350, Connecticut Gen. Stats. Revision of 1949. The Grand Jury charged a deliberate and premeditated

killing under the statute. The petitioner's contention here, and in the Courts below, is, in view of the indictment and the state statute involved on which the indictment was predicated, and therefore the state court's jurisdiction also, that the state court's charge allowing the jury to convict for murder in the first degree if the jury found an "unlawful" act involved in the crime charged, rendered the state statute too vague and uncertain by constitutional standards, in that the requirement that the statute reasonably inform the petitioner of that which he stood charged, was not met. The trial court's charge also allowed the petit jury to override the State Legislature in its state constitutional domain to enact exclusively the law, and that therefore the state courts lost jurisdiction dependent on the statute involved under the indictment (See Article Second, Conn. Const., page 4 supra). This Court requires that a State statute reasonably inform an accused. Lanzetta V. New Jersey, 306 U.S. 451.

The jury that was allowed in this case to run with a free rein was composed mostly of "talesmen" handpicked by the sheriffs of the County after almost a full year delay to trial while the regular jury panel was being exhausted.

After conviction, two new trial petitions

were made and denied, one on a confession of perjury by the State witness Edith Springer; the other on a confession by one Blumetti that he and Lowden, not the petitioner, were guilty of the crime charged. Smith V. State, 139 Conn 249 and 141 Conn. 202. Those issues are irrelevant here.

In Nov. 1964 the petitioner filed in the U.S. District Court for Connecticut a petition for a writ of habeas corpus. Denied, U.S. ex rel. Smith V. Reincke, 239 F. Supp. 887; aff'd 254 F. 2d 417. In reply to a claim then made on the sufficiency of the indictment to support a felony conviction, the State Attorneys for Fairfield County Connecticut admitted that no unlawful act of any kind had been involved in the crime charged. This admission is set out in full in the Appendix hereto on page 4. The trial judge's charge, page 2 of the Appendix, and the opinion in State V. Smith, 138 Conn. 196, 201, clearly show that this conviction was obtained and upheld as an alleged killing in an unlawful act. The State Attorneys now claim that all this was immaterial and that in fact they did not have to prove a felony killing to get a conviction. This argument is purely academic. The conviction was in fact obtained as a killing in an unlawful act now admitted never to have happened. The articles removed from the Cadillac involved and used as a

"connecting" link were crucial and vital to the State's whole case.

On the basis of the admissions of the State Attorneys on the previous petition in the U.S. District Court for Connecticut, and other claims, this present action was begun on a petition for a writ of habeas corpus filed Jan. 2, 1972, under 28 U.S.C. § 2241. Federal jurisdiction was invoked under Cole V. Arkansas, 333 U.S. 196, on the claim that the state courts had used and applied the state statute unconstitutionally by upholding the conviction thereunder when the jury was not bound by the statute and its use was a mere fiction under circumstances wherein the jury had been allowed to make the law, and the statute was nullified and avoided. Obviously also, Federal jurisdiction lay on the U.S. District Court records. The matter of the "unlawful" act was involved in all the claims made, and Sanders V. United States, 373 U.S. 1, at 18, required all these claims to be presented together. Fay V. Noia, 372 U.S. 391, was also cited in support of jurisdiction.

After the Return to the petition was made by the Respondent, at page 15 in Appendix, Motion for Summary Judgment was made by the petitioner after making Replication to the Return. Motion re Summary Judgment, page 18, Appdx. Replication, at page 16, Appdx. Affidavits were made by the

petitioner in support of summary judgment. At pages 19 and 23, Appdx. Claims on which summary judgment was made, at page 20, Appdx..

The Respondent's Return to the petition was a series of indefinable vagaries. The Respondent failed to make any record identifiable as such. On summary judgment the Respondent set forth not a single fact why it should not issue, as Rule 56 of the Federal Rules of Civil Procedure required. Months after Summary Judgment was moved for, and long after decision was reserved on the motion, the Respondent filed an "Amended Return" without leave or permission as required by Rule 15 (a) of the Federal Rules of Procedure. This was a series of self-serving declarations and conclusions with no specified facts in their support and was an obvious ploy in evasion of the Rules. The petitioner moved to strike the matter. On the pleadings and under Rule 56 the petitioner was clearly entitled to prevail on the rulings of this Court in Alcorta V. Texas, 355 U.S. 28 and Napue V. Illinois, 360 U.S. 264. Rules 56 (a) and (e), and 15 (a), appear on page 4 supra.

The District Court ignored the Rules of procedure, the evidence and admissions, this Court's rulings, and denied and dismissed the petition alleging that these issues had already been decided against the petitioner, with the record completely devoid of any support at all for such

a conclusion, a conclusion that can not stand up and is totally unsustainable.

Both the District Court and the Court of Appeals denied a certificate of probable cause under 28 U.S.C. § 2253. The petitioner is here from the final judgments and orders of the Second Circuit on a petition for a writ of certiorari.

This petition is submitted pro se and counsel will be present on the case if certiorari is granted, and the petitioner so acknowledges to the Court.

Reasons for Granting Writ

1. The decisions below directly conflict with and ignore the rulings of this Court on knowing use of evidence by State Prosecutors to convict falsely.

The conviction herein was obtained and sustained upon evidence used falsely with the jury to convict for an alleged killing in an "unlawful" act that the state prosecutors now admit never happened. That evidence served both as a vital "connecting" link and to convict for murder in the first degree, falsely. The State Attorneys have admitted this evidence was falsely used. The Courts below have ignored the rulings of this Court in Alcorta V. Texas, and Napue V.

Illinois, supra. In both these cases this Court has reversed the convictions on evidence used to convict falsely. The Courts below also ignored a large body of such decisions rendered in the various Circuit Court of Appeals of the United States. The U.S. District Court for Connecticut allowed that this issue had already been decided previously and adversely although never before presented. There is nothing in the record to support this holding either. The District Court obviously didn't care to abide by the decisions of this Court. This Court's supervisory power is clearly needed here.

2. The Connecticut Statute Involved on first degree murder, and virtually every such statute in the United States, by their terms and as used and applied raise serious and significant questions as to their Constitutional validity.

In Connecticut as in every State of the United States the legislative power is historically and by State constitutional provision in the various state legislatures. Either by express provision or by judicial interpretation as to what is deliberate and premeditated homicide, death and life sentences are imposed under statutes for homicide in an "unlawful" act in virtually all the States. See Wharton's Criminal Law by Ronald A. Anderson, Sections 251 and 264.

Are these statutes either by their express terms or as used and applied, unconstitutional under the 14th Amendment to the Constitution of the United States of America, and other Amendments embraced thereby, for any one or more of the following reasons:

a) May jurors in State trials under such statutes decide what is an "unlawful" act a homicide in which shall be murder in the degree they may choose so that the jury is in fact deciding the "law," when historically and usually by express state constitutional provision the legislative power is in the State legislature.

b) Where a State legislature with the sole power to legislate does so and specifies certain crimes under the common law to be first degree murder when a killing is perpetrated in its commission, and specifically excludes all other killings from being murder in the first degree unless done deliberately, with premeditation and malice aforethought, may State courts allow state juries to convict for an "unlawful" act as part of an alleged killing and make it murder in the first degree if the jury finds such, so that the state statute involved is nullified, and in effect remade to the wishes of the particular jury in what it wishes to regard as an "unlawful" act punishable by death in a particular case.

c) May state courts uphold what the jury supposedly found was an "unlawful" act under these statutes without the definition of the legal elements of any act recognised at law as unlawful, so that lesser and different evidence is required to convict than when an offense recognised at law is charged, and must be proved on a state trial to a state jury according to all its legal elements, so that in fact there is a denial of the equal protection of the law where state juries decide under these statutes what is an "unlawful" act.

d) Do such statutes reasonably inform the accused of that which is to be defended against when state juries decide what is an "unlawful" act to be punished thereunder, the defendant having no possible way to determine what the jury will conclude to be an "unlawful" act.

e) Do not such statutes so used permit the application of ex post facto law by state juries in convicting thereunder.

f) For any one or more of the foregoing reasons must State Legislatures define the law, and must state juries be held to and instructed under that law, so that state court defendants may be reasonably informed and have an opportunity to defend, as well as the equal protection of the

law, and so that it may be determined that the law as enacted by the state legislatute has been met.

Death, and life, sentences have and are being imposed under these statutes across the country by juries deciding what is an "unlawful" act, and since this Court's latest ruling on the death penalty, such sentences are now being made mandatory. Whether these state statutes used to inflict such sentences are constitutional ought to be determined inasmuch as these issues are squarely presented in this case wherein the state jury was allowed to convict and render a death sentence on finding an "unlawful" act involved, and contrary to the specific terms of the state statute involved.

3. The decisions of the Second Circuit raise significant and important federal jurisdiction, practice and procedural problems that call for the exercising of this Court's supervision.

The Courts of the Second Circuit have ignored the rulings of this Court on identical issues, denied federal jurisdiction based on the U.S. District Court's own records, ignored the Rules of pleading and evidence in general, and Rules 56 § (a) and (e) and 15 (a) of the Federal Rules of Civil Procedure in particular. The U.S.

District Court for Connecticut made a decision completely without support of any kind in the record, and unsustainable by fact in holding that the issue of knowing use of false evidence to convict was previously decided, which cannot be sustained by any record, and was and is a fiction that evades this Court's rulings. This Court should intervene to prevent such practices and any encouragement of them.

Further, Cole V. Arkansas, 333 U.S. 196, ought to be resolved so that federal jurisdiction will lie where relief by certiorari has become unavailable directly to this Court on the abuse of state statutes by state courts in upholding convictions wrongfully under them.

Conclusion

For these reasons, a writ of certiorari should issue to review the decisions, orders and judgments of the Second Circuit.

Respectfully submitted

Francis C. Smith
Box 100
Somers, Conn.
06071

August 1973

STATE OF CONNECTICUT

COUNTY OF FAIRFIELD

My name is John H. Smith and I reside in the Town of Norwalk, Fairfield County Connecticut, at 5 Hill Street. I am over eighteen years of age and I am a citizen of the United States of America and not a party to the within entitled action.

On the day of 1973, I served three (3) true copies of the within Petition for a Writ of Certiorari, and the Appendix thereto, on the Attorney for the Respondents, Assistant State Attorney Richard F. Jacobson, by enclosing said copies in a sealed envelope with postage first-class thereon fully prepaid in the United States mail at Bridgeport, Connecticut, addressed as follows:

Asst. State Attorney
Richard F. Jacobson
172 Golden Hill Street
Bridgeport, Connecticut
06604

I, John H. Smith, having been duly sworn, attest to the truth of the foregoing under penalty of perjury, before , Notary Public, on this day of 1973, at Connecticut.

John H. Smith

To the truth of the foregoing, I , Notary Public, on this day of 1973, notarise and set with my seal of office

Seal

Notary Public

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APPENDIX

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JUDGMENT FILE

STATE V. FRANCIS CLIFFORD SMITH

No. 11,372

At a Superior Court holden at Bridgeport, in and for Fairfield County, on the Second Tuesday of April, 1950.

PRESENT. HON. J. HOWARD ROBERTS, JUDGE

Upon a bill of indictment laid before the Grand Jury in and for Fairfield County, duly summoned, impaneled and sworn which bill of indictment was returned indorsed "a true bill" accusing Francis Clifford Smith of Darien, Connecticut of the crime of Murder in the First Degree and charging that said Francis Clifford Smith on the 23rd day of July, 1949 in Greenwich deliberately, with premeditation and malice forethought, did shoot and kill one Grover S. Hart, against the peace and contrary to the form of the statute in such case made and provided; the defendant appeared and for plea said "not guilty".

The case came thence to May 16, 1950 when the defendant filed his challenge to the array of jurors and the parties appeared and were at issue on the State's demurrer to said challenge to the array of jurors, as on file.

The Court having heard the parties, found the issues upon said demurrer for the State and that said challenge to the array of jurors was insufficient.

The case came again to May 16, 1950 when the defendant filed an amendment to the challenge to the array of jurors and the parties appeared and were at issue on the State's demurrer to said amendment to the challenge to the array of jurors, as on file.

The Court having heard the parties found

the issues upon said demurrer for the State and that said amendment to the challenge to the array was insuffient.

The case came thence to May 24, 1950 when before the jury was sworn the defendant filed a motion for mistrial which motion the Court denied; and again to the same day when after the jury was sworn the defendant again moved in open Court for a mistrial which motion was denied.

The case came thence to June 7, 1950 when after a full hearing the case was committed to the jury which returned a verdict of "Guilty of Murder in the First Degree".

It was therefore considered by the Court that the defendant is Guilty in manner and form charged in the indictment.

The Court thereupon sentenced the defendant to be conveyed to the Connecticut State Prison at Wethersfield, there to be kept until November 20, 1950 when the punishment of death shall be inflicted upon him.

Thereupon the defendant filed a motion to set aside the verdict of the jury. The case came thence to the present time when the Court denied said motion to set aside the verdict.

By the Court

Henry E. Shannon
Assistant Clerk

#11372 State V. Francis Clifford Smith

Sept. 25, 1950 - Appeal Filed

Aug. 7, 1951 - Judgment of Supreme Court "There is no error"

Sept. 12,1951 - Defendant sentenced to death on Oct. 29, 1950

Oct. 28, 1951 - Execution of sentence postponed until Apr. 21, 1952.

Jan. 11, 1952	- Execution of sentence postponed until April 21, 1952.
April 10, 1952	- Execution of sentence postponed until Sept. 15, 1952.
Sept. 4, 1952	- Execution of sentence postponed until Jan. 12, 1953.
Nov. 12, 1952	- Judgment of Supreme Court "There is no error".
Dec. 5, 1952	- Defendant sentenced to death on Jan. 12, 1953.
Jan. 15, 1953	- Execution of sentence postponed until March 16, 1953.
May 11, 1953	- Defendant sentenced to death on June 7, 1954.

APPLICABLE PORTIONS OF TRIAL
JUDGE'S CHARGE TO THE JURY
ON ELEMENT OF UNLAWFUL ACT

Sec. 153 of State Court Record.

The State claims that the accused and Lowden joined in a common design to go armed with revolvers or pistols to the Indian Harbor Yacht Club in Greenwich on July 23, 1949, for the purpose of committing some unlawful act therein, such as larceny and that the natural and probable consequences of the execution of their design involved the contingency of taking human life to prevent capture or to aid in effecting their escape.

Sec. 160 of State Court Record.

If you find that the accused did not actually fire the shot that killed Hart but that it was done by Lowden or another in carrying out a common design entered into by the accused as I have explained to you, then this rule which I am explaining applies. The controlling question is not whether the malice and premeditation of the one who actually fired the shot that killed Hart, if you find such malice and premeditation existed, are imputable to the other, but rather whether existence of the conspiracy or common design to commit an unlawful act renders him responsible for the natural and probable results of the execution of that original unlawful act. If you find

that the accused Smith and another be it Lowden or another at some time prior to the shooting of Hart made up their minds in a common design to commit an unlawful act such as larceny at the Indian Harbor Yacht Club on July 23, 1949, at any hazard and that they knew that the enterprise would be dangerous and expose them to danger should they be discovered in carrying out their unlawful act and that the accused and his companion wilfully, deliberately and premeditatedly and with malice aforethought determined to arm themselves, or to arm any one of them with dangerous weapons such as pistols, and that while engaged in the unlawful act or in the furtherance thereof they were discovered by the deceased and in order to assist their escape the night watchman, Hart, was wilfully killed by being shot to death by one or both of them and that the natural and probable consequences of the execution of the unlawful act which they had entered into a common design to commit involved the contingency of taking human life, then you would be justified in finding such of them as you find entered into that common design and continued into that common design, guilty of first degree murder, notwithstanding the fact that you may find that Hart died as a result of wounds he received from a gun fired by only one of them.

STATE ATTORNEYS' STATEMENT TO
U.S. DISTRICT COURT AS MADE
BY STATE ATTORNEY McGOWAN

In U.S. ex rel. Smith V. Reincke, Civil No. 10712, U.S. District Court for Connecticut, Robert C. Zampano, J., State Attorney McGowan addressed the Court as follows:

"The petitioner has claimed in his petition and has argued before your Honor that the State can't get a conviction of a first degree murder on a claimed theft or a claimed burglary or a claimed breaking and entering.

Well, your Honor, the State didn't charge him with a theft or a burglary or breaking and entering. I ask your Honor to please just refer to page 1 of State's Exhibit 1, the record, and I would just like to read this into the record, your Honor. What I am now going to read is the true bill that was returned by the Grand Jury, and it reads as follows:

'The Grand Jurors within and for said County accuse Francis Clifford Smith of 35 Linden Ave., Darien, in said County, of Murder in the First Degree and charge that on the 23rd day of July 1949, at Greenwich, in said County, the said Francis Clifford Smith wilfully, deliberately, with premeditation and malice aforethought did shoot and kill one Grover S. Hart against the peace and contrary to the form of the statute in such case made and provided.'

Your Honor, the indictment against this man to which he was put to plea upon, to which he went to trial by and was found guilty by a jury of his peers is based upon that indictment. It is not based upon any claim that he committed burlary or that he committed a breaking and entering or a theft and therefore as a result of the commission of such acts a killing or a homicide results it constitutes first degree murder. The State does not make that claim, your Honor.

The State relies entirely upon the wording of that indictment and that is that he did wilfully, deliberately with premeditation and malice aforethought did shoot and kill one Grover S. Hart. It doesn't say what he was doing at the time or that it was in the commission of a felony. And the only reason that the State respectfully submits to your Honor that the evidence that was found in the automobile was introduced into evidence in this trial was not to show that Smith had stolen that stuff from the club, but to show and place Smith in that club becuase these articles, by the testimony of the witnesses from the club, belonged to the club. There was some neckties, there was some tie clasps, all with the insignia of the yacht club on them. There was a man's hat, there was a slip of paper, all of which were identified, your Honor, as being the property of the club.

What is the reasonable and logical inference

from that, your Honor? The State respectfully submits this, that one with those articles in his possession must have gotten them from this particular place of where they claimed ownership. That is the purpose of that, your Honor. It is not to show that Smith committed a burglary or a breaking and entering in that club. And he argued here personally himself this morning that the State failed because he feels that was a twenty-four hour club, open twenty-four hours down there and there would be no need to break into it in order to get into it. Well, there is no such evidence in this club that it was such a type of a club, your Honor, and furthermore, I don't argue that point. I am only commenting upon his observation here this morning, of which he wasn't too certain.

He said he thought it was open twenty-four hours, but we don't claim that we have to establish that this petitioner here committed these acts of theft or larceny or breaking and entering or a burglary in order to substantiate a conviction based upon that indictment as I have read it.

I am sure your Honor knows that if a person deliberately equips himself with a fatal firearm and in the use of that, presumably either to effect a get-away or to destroy any evidence as to his identity, is, under our law, a wilfull, premeditated murder in the first degree with malice

aforethought. That is the basis upon which the State claims that there was adequate evidence offered in this case for the jury to conclude as it did.

Now that, your Honor, is my observation on behalf of the State as far as the charge to the jury is concerned."

STATE V. SMITH, 138 Conn. 196, 201, PARAGRAPH NINE

To warrant a conviction, there must be no reasonable doubt as to any essential element of the crime charged. State V. Newman, 127 Conn. 398, 400, 17 A 2d 774. An essential element of the crime of murder in the first degree as charged in the indictment in this case was that the killing was wilful, deliberate and premeditated. The only reasonable inference from the fact that the defendant in this case carried a deadly weapon with him when he was engaged in the commission of a theft was that he planned to kill any one who interfered with him. That means that for an appreciable period of time before the shot was fired he premeditated a killing. (cases cited). The evidence was adequate to justify the jury in concluding that it had been established beyond a reasonable doubt that the defendant was guilty of murder in the first degree.

OPINION, CONNECTICUT SUPREME COURT
STATE V. SMITH, 138 Conn. 196.

Inglis, J. The defendant was found guilty of murder in the first degree upon an indict ment charging him with wilful, deliberate and premeditated muredr. Upon this appeal, he has assigned as error the denial of his motion to set aside the verdict, the sustaining of a demurrer to his challenge to the array of the panel, the denial of his motion for mistrial, a claimed error in the charge and certain rulings on evidence.

In the early morning of Saturday, July 23, 1949, Grover S. Hart was shot and killed in the clubhouse of the Indian Harbor Yacht Club of Greenwich where he was employed as a night watchman. The principal question in the case is whether the state proved beyond a reasonable doubt both that the defendant was implicated in the killing and that the murder was wilful, deliberate and premeditated. From the evidence, the jury might reasonably have found, among others, the following facts: The bullet which cause the death was discharged from a Smith and Wesson .22 caliber revolver. There were found on the premises, in the near neighborhood of the shooting, two other bullets and four cartridge cases marked XR. At least one of these bullets and the four cartridge cases had come from a .22 caliber automatic pistol.

About half past one in the morning of Sunday, July 24, two New York state policemen discovered parked at the Hollywood Cafe in Brewster, New York, a gray Cadillac automobile with New Jersey registration plates NN 65 A. There was a piece of rope tied to the handle of the trunk to hold it in place. When the car was first seen, one man was standing by the open left front door and another was seated on the right side of the front seat. Thepolicemen left to get their own automobile and by the time they returned to the Cadillac both men had disappeared. There was found in the Cadillac a .22 caliber Colt automatic pistol

with a clip of shells each bearing the marking XR. The pistol was the gun from which the four cartridge cases found at the scene of the crime had been ejected. It was in a leather holster. There was also discovered in the car another leather holster. Both the Colt and its holster and the second holster had been stolen on July 9 from a house in New Canaan, and when stolen the second holster had contained a Smith and Wesson .22 caliber revolver. The Cadillac also contained a hat which was the property of the manager of the Indian Harbor Yacht Club, six neckties bearing the insignia of the yacht club, a memorandum made by an employee of the club, several small pieces of jewelry and two tie clasps, all of which had been removed from the Indian Harbor Yacht Club on the night of the killing. In the Cadillac was a white shirt bearing a laundry mark which indicated that it belonged to a man named Smith who lived in Noroton Heights, Darien. The defendant's parents resided there and at times he stayed with them. There was also a set of Connecticut motor vehicle registration plates marked SA 661.

Shortly before the car was first noticed by the New York police, the defendant was at the bar inside the Hollywood Cafe drinking beer. The Cadillac car had been stolen from Frederick B. Freid of Stamford in June 1949. At that time it bore Connecticut registration plates SS 404. On several occasions during June and July the defendant was seen driving a gray Cadillac car which corresponded in description to the one found by the New York police in Brewster, even to the extent that a rope was tied so as to hold the trunk cover in place. At various times the car driven by the defendant bore Connecticut license plates SS 404 and SL 513. Registration plates Connecticut SL 513 and Connecticut SA 661, found in the car at Brewster, and New Jersey NN 65A had all been stolen from a garage in Stamford.

The defendant was arrested on July 28. He was found concealed in the woods at the Wilton reservoir. He gave the name of Frank Lynch, denying that his name was Smith, and claimed that

he was a member of a camping party which was in the neighborhood. It developed that there was no truth to his claim. He had in his possession a bottle of hair dye.

On the trial the defendant took the stand on his own behalf. He denied that he had any connection with the Cadillac car found in Brewster and offered a rather weak alibi both for the time of the crime and for the time when the car was found. He did admit that he had been driving a Cadillac car during June and July, but claimed that it was a different model and belonged to a gambler by whom he was employed. He accounted for the fact that he had been hiding out from the police on the ground that he thought they were after him for violation of parole from state prison. His answers to questions on cross-examination were evasive to such extent that the jury might reasonably have found that he was entitled to no credit.

It is apparent that the state's case relating to the connection of the defendant with the killing and to proof of the premeditation of the killing rested exclusively on circumstantial evidence. It does not follow from that, however, that it was not a strong case. The law recognises no distinction between circumstantial evidence and direct evidence so far as probative force is concerned. If evidence, whether direct or circumstantial, should convince a jury beyond a reasonable doubt that an accused is guilty, that is all that is required for a conviction. (Cases cited). As has been said so often, proof beyond a reasonable doubt is such proof as precludes every reasonable hypothesis except that which tends to support and is consistent with the defendant's guilt and inconsistent with any other rational conclusion. The requirement that evidence must be such as satisfies beyond a reasonable doubt "does not mean that the proof must be beyond a possible doubt, and a possible supposition of innocence is a far different thing from a reasonable hypothesis." (cases cited).

In the present case the presence in the Cadillac, as it stood at the Hollywood Cafe, of one

of the guns which had been discharged at the scene of the killing and of the various articles which had been taken from the Indian Harbor Yacht Club warrants the inference, in the absence of any evidence to the contrary, that whoever was then in possession of the car had been one of those who did the killing. The fact that the accused was in the neighborhood when the Cadillac was found, that what was probably his shirt was in the car and that he had been driving the same car for several weeks before that time led irresistably to the inference that it was he who was in possession of the car. It follows that this evidence, supported by the evidence of the guilty conduct of the defendant at the time of his arrest and other facts of lesser importance, was sufficient to justify the jury in finding that it had been established beyond a reasonable doubt that the defendant was one of the participants in the crime. (case cited).

To warrant a conviction there must be no reasonable doubt as to any essential element of the crime charged. (case cited). An essential element of the crime of murder in the first degree as charged in the indictment in this case was that the killing was wilful, deliberate and premeditated. The only reasonable inference from the fact that the defendant in this case carried a deadly weapon with him when he was engaged in the commission of a theft was that he planned to kill any one who interfered with him. That means that for an appreciable period of time before the shot was fired he premeditated a killing. (cases cited) The evidence was adequate to justify the jury in concluding that it had been established beyond a reasonable doubt that the defendant was guilty of murder in the first degree.

When the trial of the case started, there were on the regular panel only thirty-four jurors. Seven of these had to be excused because they had already served the statutory period of four weeks. Gen. Stats. Supp. 1949, § 657a. There were no other names on the jury list of the county for the court year. To complete the jury for the trial of the case, the court directed the sheriff to

summon talesmen, and 115 talesmen were called. A total of 112 prospective jurors were summoned on the voir dire before the selection of the twelve jurors and two alternate jurors were completed. Of those 112, 60 were men and 52 were women. The jury as selected were composed of five men and seven women, and the two alternates were women. In the selection the defense used 28 of its 30 challenges.

Before the start of the trial the defendant challenged the array on the ground that there were not enough jurors left on the regular jury list for the court year to permit the obtaining of a jury to hear the case. A demurrer to the challenge to the array was sustained. A challenge to the array is proper only to state an objection to the panel as a whole on some ground that affects the entire panel. (cases cited). It will be allowed only on some ground which arrises out of the proceedings in selecting and summoning the panel. (case cited). The ground alleged in the defendant's challenge to the array was, therefore, insufficient, and the sustaining of the demurrer to it was not erroneous.

After the impaneling of the jury, the defendant moved for a mistrial on the ground stated in his challenge to the array and on the added ground that the use of talesmen deprived him of the safe guards and information which he would have had if the veniremen had been called from the regular jury list. Neither of these grounds was well taken. It was well within the discretion of the trial court to start the trial with only twenty-seven jurors from the regular jury list available. A court may always, when there is "any cause" therefore, resort to the summoning of talesmen to fill out a jury. Gen Stats. § 7925. This is true even though there are persons left on the year's list who have not served. In the present case, if talesmen could not have been resorted to, the trial would have had to be delayed for at least four months. The information to which the defendant referred in his motion was that which appears on the questionnaires returned to the jury commis-

sioners in the selection of qualified jurors, are filed in the clerk's office and are open to inspection by any litigant or his attorney. That such information was not readily available at hand to the defendant in this case did not prejudice him. He was privileged, by examing each talesman on the voir dire, to elicit the same sort of information as would have appeared on the talesman's questionnaire if he had been on the regular jury list. The same objection could be made in any case in which talesmen are used, to the end that the unquestioned power of the Courts to summon talesmen would be of no avail. The denial of the motion for a mistrial was proper.

The complaint which the defendant makes to the charge is nothing more than that, in view of the fact that the charge discussed the evidence in extenso, it should have stated in greater detail the application of the principle that it was for the jury to decide the facts of the case. A reading of the charge discloses that the jury were explicitly instructed that it was their exclusive function to decide all questions of fact, that it was for them to pass upon the credibility of witnesses, that their recollection of the evidence would control and that it was in their province to determine what reasonable inferences were to be drawn from the facts which they found proven. The discussion of the case all through the charge was in such form that the principle that the jury were the sole judges of the facts was implicitly recognised and reflected. There is no merit to the defendant's claim of error in the charge.

The only other matter claimed by the defendant to be reversible error which merits consideration is a series of rulings admitting portions of the testimony of George Lowden, a witness called by the State. When Lowden was first called to the witness stand, he volunteered the statement that he did not wish to testify for either the defense or the prosecution. After testifying that he had pleaded guilty to murder in the second degree in connection with the killing of Grover

Hart, he was asked if he knew Frank Smith. Before he could answer the question, defendant's counsel suggested that Lowden be advised of his constitutional privileges. He was so advised by the Court. Lowden then testified that he did know Smith and that he had seen him in July 1949. He went on to testify that in the morning before taking the stand he had told the state's attorney that he would tell the truth. The jury were then excused and Lowden conferred with the Public Defender as to his right to refuse to testify as to matters which would tend to degrade and incriminate him. After the jury were recalled, the witness, when asked whether he and Smith had been together on the night of July 22, refused to answer. When asked the reason for his refusal, he said, "We will put it that it might incriminate Frank Smith and then I refuse to do so." This answer and several others of like tenor which were given in the further examination of Lowden were, upon motion of the defendant, later stricken and the jury were told to ignore them. Likewise some testimony of the same witness as to the contents of a statement given by him to the police was later stricken and the jury told to ignore it. The defendant also excepted to the Court's ruling which permitted the state's attorney to cross-examine Lowden. It was clear that the state was taken by surprise by the witness' refusal to testify on important matters, and under the circumstances it was well within the discretion of the court to allow cross-examination. (case cited). That testimony of Lowden objected to by the defense which was allowed to stand was properly admitted.

There is no error.

In this opinion the other judges concurred.

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS, U.S. DISTRICT COURT

And now comes Frederick E. Adams, Warden, of the Connecticut State Prison, respondent in the above entitled cause of action and makes return that:

1. The petitioner Francis C. Smith is now in the custody of the respondent by virtue of a State Prison mittimus based upon a judgment of the Superior Court within and for the County of Fairfield, rendered on the 7th day of June 1950, a certified copy of which judgment is attached hereto and made a part hereof and filed in this court. The Board of Pardons at a later date, June 7, 1954, commuted the aforesais verdict and sentence to one of life imprisonment which is now in full force and effect.

2. As to the remaining allegations in the petition for a writ of habeas corpus now pending before this court, the same are denied in their entirety.

3. The respondent affirmatively pleads that portions of the matters herein have never been submitted for determination by Courts of the State of Connecticut prior to the commencement of this proceeding.

4. The respondent affirmatively pleads that portions of the matters herein have previously been determined by the United States District

Court in the case of United States ex rel. Frank C. Smith, Petitioner, V. Frederick G. Reincke, Warden, Civil No. 10712 and that said determination is res judicata and finally determinative.

Respondent

By Richard F. Jacobson

Copy to Petitioner

PETITIONER'S REPLICATION TO THE RETURN TO THE PETITION FOR WRIT OF HABEAS CORPUS, U.S. DISTRICT COURT

And now comes Francis C. Smith, petitioner in the above entitled action, who replies to the Return of the Defendant that:

1) The jurisdiction of this Court is a matter solely within the discretion of this Court, and that the petitioner has shown good cause therefor in his petition for habeas corpus, and further this is the only Court in which the State Attorneys have admitted that no unlawful act of any kind was involved in the crime charged.

2) The petitioner affirmatively denies that any matter alleged by him in his petition is res judicata and that he is supported in this by applicable federal decisions, and further that no claim other than the third has been previously presented to this Court by this petitioner, and

the petitioner states further that the defendant makes his allegations in most general and vaguest terms whereas the petitioner has precisely pinpointed his claims and allegations which for the most part specify that the Connecticut Courts in this case have overridden the Connecticut State Legislature in its legislative enactment, and that in so doing the said courts overrode State Constitutional provisions as to separation of powers and allowed a petit jury to remake and fashion the law also contrary to State Constitutional provisions in regard to both the powers of the General Assembly, and the Grand Jury, in which the said Courts also had a hand and so rendered, among other things, the Connecticut Statute involved unconstitutional under the 14th Amendment to the Constitution of the United States, as well as other Constitutional rights as alleged in the petition, all of which has a thrust under constitutional law different in kind from anything yet presented by this petitioner in this Court, and the petitioner therefore denies all the allegations of the defendant in this respect.

Respectfully submitted.

Francis C. Smith
Petitioner, pro se

Copy to State Atty.

MOTION FOR SUMMARY JUDGMENT

And now comes the petitioner in the above entitled action, who says on his personal knowledge that:

1) The indictment as set out in paragraph 21 of the petition for habeas corpus is the true indictment rendered by the Grand Jury for Fairfield County Connecticut against the petitioner.

2) Section 8350 of the Connecticut General Statutes Revision of 1949 is as alleged in chapter 19 of the petition for habeas corpus, in its applicable portions.

3) The trial judge charged the jury as set out verbatim in paragraphs 14 and 16 of the petition for habeas corpus, which charge was made in the petitioner's presence.

4) Article First Section 9 of the Connecticut Constitution as effective in 1949 and 1950 read as alleged in paragraph 20 of the petition for habeas corpus.

5) State Attorney McGowan addressed the Court as alleged and set out verbatim in paragraph 24 of the habeas corpus petition

6) The Connecticut Supreme Court of Errors upheld the petitioner's conviction as a killing in a theft as reported in the official Connecticut Supreme Court Reports, State V. Smith, 138 Conn. 196.

7) The Connecticut Superior Court imposed a

three to seven year sentence upon the petitioner as stated in the ninth claim of the petition for habeas corpus.

Wherefore the petitioner moves for Summary judgment on all claims except the third and fourth claims as made in the petition for habeas corpus.

Dated May 15 at Somers, Connecticut.

Francis C. Smith
Petitioner, pro se

State of Connecticut
County of Tolland ss. Somers, Connecticut

The truth of the foregoing has this 15th day of May 1972 been sworn to and attested to, the attestor Francis C. Smith having been first duly sworn upon oath, at Somers, Connecticut.

Robert P. Callahan
Notary Public

Seal of Notary Public

AFFIDAVIT RE MOTION
FOR SUMMARY JUDGMENT

And now comes Francis C. Smith, the petitioner in the above entitled action, who swears, attests and deposes to the truth of all matter as alleged in his Motion for Summary Judgment, and all matter as alleged in the Statement of

Facts in his petition for a writ of habeas corpus.

Francis C. Smith
Petitioner, pro se

State of Connecticut
County of Tolland ss.

Somers, Connecticut

On this 15th day of May 1972, in the Town of Somers, Connecticut, appeared before me the petitioner in the above entitled action, Francis C. Smith, who, being first duly sworn, attested to the truth of the foregoing above.

Robert P. Callahan
Notary Public

Seal of Notary Public

(Copy to State Atty.)

THE CLAIMS UPON WHICH SUMMARY JUDGMENT WAS MOVED IN U.S. DISTRICT COURT

Wherefore the petitioner, Francis C. Smith, appears and pleads that his Constitutional rights as guaranteed by the Fourteenth Amendment and the due process of law clause of the Constitution of the United States of America were violated:

1. By the Connecticut Supreme Court in upholding his conviction as a crime of murder in the first degree for a specific offense which the

Connecticut State Legislature made murder in the second degree by specific provision and exception.

2. By the prosecutors for the State knowingly allowing evidence to be used to obtain a conviction for a killing in an unlawful act which said prosecutors knew had never been committed, and also knew and have admitted that said evidence was not introduced to claim or prove any unlawful act and that no unlawful act of any kind such as burglary, theft, breaking and entering, or robbery was intended or meant to be claimed by the State as part of the crime charged, although said prosecutors stood silently by and allowed the jury to be charged that it could convict and have the petitioner sentenced to death for a killing in an unlawful act that they knew had never happened, and also stood silently by as the Connecticut Supreme Court of Errors upheld the conviction and allowed that articles taken from an automobile twenty-four hours after the commission of the crime charged "proved" that an unlawful act had been perpetrated as part of the crime charged.

5. By the Connecticut Supreme Court of Errors in upholding the petitioner's conviction contrary to the intent of the body that possessed the sole State Constitutional authority to indict and charge, the Grand Jury for Fairfield County, Connecticut, which said body in its indictment char-

ged murder in the first degree "contrary to the form of the statute in such case made and provided."

6. By the act of the Connecticut Supreme Court of Errors holding that an "unlawful" act had been proved when the petit jury could not have found any determinable unlawful act "proved" because the legal elements of no "unlawful" act were defined to the jury, and therefore just what kind of an "unlawful" act the jury supposedly found "proved," if in fact any at all, was incapable of determination by the said Court, which therefore could not hold that any "unlawful" act had been found proved by the jury, especially one that by law constituted murder in the first degree under the statute.

7. By the Connecticut Supreme Court of Errors allowing by its decision the petit jury to determine what kind of an "unlawful" act would constitute murder in the first degree, although the Connecticut statute defined only certain "unlawful" acts a killing in which was murder in the first degree, under which statute the petitioner was indicted by the Grand Jury "contrary to the form of the statute in such case made and provided."

8. In that Section 8350 of the Connecticut General Statutes Revision of 1949 was too vague and uncertain as applied by the Connecticut Courts and Connecticut Supreme Court of Errors for the petitioner to have been able to ascertain just

what he was supposed to defend against.

9. In that the State Courts have imposed upon the petitioner further sentence because he sought to avoid and defend himself against the sentence herein challenged and complained of.

SUPPLEMENTARY AFFIDAVIT TO
MOTION FOR SUMMARY JUDGMENT

And now comes the petitioner in the above entitled action, Francis C. Smith, who says that;

1) The petitioner in the above entitled action was present at all times when evidence was presented at the trial which resulted in the present conviction now challenged in the above entitled action and that the petitioner has and possesses personal knowledge of all matters that had to do with the selecting and impaneling of the jury in the said case on the trial, as well as the presentation of the evidence on the trial to the jury, and the trial judge's charge to the jury.

2) That all matter of fact as alleged and stated in the petition and Amended petition for a writ of habeas corpus are true on the personal knowledge of the petitioner.

3) That the one and only ground upon which thejury were instructed that they could convict for murder in the first degree as a deliberate

and premeditated murder was that of an alleged killing in an unlawful act if the jury found that there had been such.

Francis C. Smith
Petitioner, pro se

State of Connecticut
County of Tolland ss.

Somers, Connecticut

On this 13th day of October 1972, personally appeared before me the petitioner in the above entitled action, Francis C. Smith, who, being duly sworn, states on his oath that the foregoing allegations made on his signature are true on his personal knowledge.

Peter J. Seaha
Notary Public

Seal of Notary Public

Copy to State Atty.

MEMORANDUM OF DECISION,
U.S. DISTRICT COURT

This is another in a series of applications filed by the petitioner challenging his state conviction of first degree murder of June 7, 1950. See e.g. State V. Smith, 138 Conn. 196 (1951); Smith V. State, 139 Conn. 249 (1952); Smith V. State, 141 Conn. 202 (1954); United States V. Reincke, 239 F. Supp. 887 (D. Conn. 1965), aff'd, 354 F. 2d 417 (2 Cir. 1965).

A careful review of the voluminous moving papers of Smith's latest application for a writ of habeas corpus indicates that, with one exception, each allegation of a denial of a constitutional right during his state trial was judicially considered and rejected on prior occasions. No sound reason is advanced why this Court should again consider and rule upon them. The petitioner asserts no new facts or issues not previously presented to this Court, and the petitioner has made no showing that the ends of justice would be served by permitting the redetermination of the merits of this subsequent application. See Sanders V. United States, 373 U.S. 1, 15 (1962).

The only issues not previously adjudicated is the claim that the statute persuant to which petitioner was convicted, Conn. Gen. §§ 8350, was unconstitutionally vague and uncertain to support that conviction. Since it appears this

contention was not raised in the petitioner's prior applications for relief in the State Courts, he has failed to exhaust his state remedies as mandated by 28 U.S.C. § 2254. In addition, however, the claim has no merit.

Smith contends the statute is unconstitutional because he did not know "what he was to be convicted of until he was notified of that which the State court decreed him guilty." In effect, this argument is a rehash of his prior attacks on the sufficiency of the indictment and his claim that the conviction was based on a ground not alleged in the indictment. See United States V. Reincke, supra, 239 F. Supp. at 891-92. The indictment clearly charged him with premeditated murder done with malice aforethought and that is exactly what he was convicted of after a lengthy state trial.

Accordingly, the petitioner's application for a writ of habeas corpus is denied.

Dated at New Haven, Connecticut, this 18th day of April, 1973.

Robert C. Zampano
U.S. District Judge

JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

This cause came on for consideration on a petition for a writ of habeas corpus, and the Court having entered its Memorandum of Decision thereon under date of April 19, 1973, denying the said petition,

It is accordingly ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered, dismissing the petition for a writ of habeas corpus.

Dated at New Haven, Connecticut, this 24th day of April, 1973.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court.

FRANCES J. CONSIGLIO
Deputy-in-Charge

ORDER OF JUNE 26, 1973, IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DENYING APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS, AND ITS DISMISSAL.

A motion having been made herein by relator pro se for a certificate of probable cause,

Upon consideration thereof, it is
Ordered that said motion be and it hereby is denied.

Henry Friendly
Wilfred Feinberg
Walter R. Mansfield
Circuit Judges

SUPREME COURT, U. S.
FILED
DEC 27 1973
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-474

UNITED STATES OF AMERICA
ex rel. FRANCIS C. SMITH
Petitioner

V.

CARL ROBINSON, Warden
Connecticut State Prison
Somers, Connecticut

JOHN R. MANSON, Commissioner
Connecticut Department
of Corrections
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

FRANCIS C. SMITH
Box 100
Somers, Connecticut 06071

Pro se

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-474

UNITED STATES OF AMERICA
ex rel. FRANCIS C. SMITH
Petitioner

V.

CARL ROBINSON , Warden
Connecticut State Prison
Somers, Connecticut

JOHN R. MANSON, Commissioner
Connecticut Department
of Corrections
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on December 3, 1973, and (2) granting the petition. As grounds for this motion, petitioner states the following:

Evidence used falsely to convict is an inde-

pendent violation of a constitutional right. Napue V. Illinois, 360 U.S. 264. This is a separate and distinct claim from a claim that the indictment did not charge a felony-class killing. There is a different factual and legal basis to both. An admission made therefore in reply to a claim that the indictment did not charge a felony-class killing, which admission was that there was no unlawful act involved in the crime the conviction for which was being challenged and had been obtained on a charge to the trial jury that they could convict for an alleged killing in an unlawful act as the state prosecutors stood by silently and said nothing and let the petitioner be wrongfully convicted and sentenced to death for an alleged killing in an unlawful act which they now admit never happened, laid the basis and foundation for a wholly different claim of a denial of a constitutional right, one based on the knowing use of evidence to convict falsely for an act that never happened. (See Appx, p. 2, the charge. See Appx., p. 4, the McGowan statement). The petitioner herein made that claim based on the 1964 admission of the state attorney. Sanders V. United States, 373 U.S. 1 at 15 clearly was not intended by this Court to apply on these circumstances.

The United States District Court denied and dismissed the present petition for a writ of habeas

corpus filed in that Court and held that each allegation of a denial of a constitutional right during the petitioner's trial was judicially considered and rejected on prior occasions, except one. See District Court Opinion, p. 25, Appx. Both the factual and the legal basis for this statement fail to appear of record. They do not appear of record from the pleadings made by the attorney for the Respondents, the State Attorney for Fairfield County, Connecticut. See the Return, p. 15, Appx. See Amended Return, R. Doc. No. 35. The record does show however that both the trial judge charged the jury (Charge, p. 2, Appx.) that they could convict for an unlawful act, and that the state prosecutors knew that there was no unlawful act involved in the crime charged (Appx., p. 4). The petitioner's conviction was upheld as a killing in a theft. State V. Smith, 138 Conn. 196, 201 (Appx. p. 7, 8-15). There is no possible doubt here that the state prosecutors knowingly allowed evidence to be used falsely to convict, and that under Napue V. Illinois, 360 U.S. 264, the conviction is unconstitutional. There is no possible doubt that the petitioner had federal jurisdiction on a claim predicated upon the U.S. District Court records, the McGowan admission, as in page 4 of Appx. The admission that no unlawful act was involved in the crime charged. The only question remaining then is whether there was legal justification for the

ruling in the District Court that the present claims were settled previously. If there is in fact no validity to this, then a very serious miscarriage of justice has occurred, and is being aggravated and made worse by not being corrected when it has appeared and is apparent.

In the U.S. District Court the petitioner filed his original, and then later his Amended Petition for a Writ of Habeas Corpus (Doc. No. 4, R.) The U.S. District Court issued a show Cause Order and the Respondent filed his Return (Appx., p. 15). The petitioner then moved for Summary Judgment under Rule 56 (a) of the Federal Rules of Civil Procedure, with supporting Affidavits (Appx. p. 18, and pgs. 19, 23). The U.S. District Court held no evidentiary hearing on the claims of the petition, and two of the claims were not pressed in the Motion for Summary Judgment by the petitioner. The Court reserved decision, some time after which the Respondent filed an "Amended Return," which was filed out of time and without leave or permission as required by Rule 15 (a) of the Federal Rules of Civil Procedure (p. 6, cert. pet.). The petitioner moved that the "Amended Return" (R., Doc. No. 35) be struck. It was not. In fact no ruling was made by the Court on the Motion to Strike. Neither the Return nor the Amended Return set forth any specific fact in their support and consisted mainly of self-serving declarations and

conclusions. There was nothing therein upon which a judgment could be predicated in the Respondent's favor. There was nothing but a series of indefinable vagaries with no fact specified to show its relationship and manner thereof to the claims made and presented by the petitioner in his petition, and in fact were so vague and uncertain that they were unable to raise a justiciable issue as to the petitioner's claims. The petitioner had made a prima facie case especially on the admissions of the state attorneys on the unlawful act matter, and the petitioner's Affidavits were unrefuted by the state attorneys by any matter. The petitioner was clearly entitled to at least an evidentiary hearing as he clearly was entitled to federal jurisdiction on the admissions in the federal court records by the state attorneys that showed that the conviction had been obtained on a false ground with evidence falsely used for that purpose and which resulted in a death penalty. Instead of conducting an evidentiary hearing the District Court summarily denied and dismissed the petition on nothing more than self-serving and totally vague statements of the Respondent without any proof in their support. The petitioner respectfully submits that such procedure is unsustainable at law and that the District Court could not lawfully make a finding of fact and conclusions of law without an evidentiary hearing and proof made of record in

support of the finding. This is so fundamental to legal and trial procedure that it needs no explaining to this Court. Arbitrary judicial decisions rendered summarily in favor of a party without a hearing and without evidentiary proof where there must be proof that the same legal claim on the same factual basis was previously presented, determined on the merits and adversely decided, and so rendered to cut off well merited relief on a prima facie showing, is matter too serious to be tolerated where Constitutional rights are involved and are rendered meaningless and placed beyond any possible remedy by such procedure. The petitioner respectfully submits therefore that the District Court's ruling and Judgment should not be permitted to stand and that it should be reversed on certiorari as erroneous at law.

The petitioner respectfully suggests and urges that this case be remanded back to the U.S. District Court for Connecticut for an evidentiary hearing for a factual determination as to whether the petitioner's claims have in fact been previously presented and heard on the merits, and decided adversely on the same factual basis as now presented and claimed. The petitioner has attached hereto an affidavit that the District Court has never heard evidence as to any claim presented by the petitioner at any time. The petitioner further suggests respectfully that the case be remanded to be heard

by an impartial U.S. District Judge and preferably the Chief U.S. District Judge for the factual determination to avoid possible hostility, with judgment to be rendered in accordance with the proof made of record. In the alternative the petitioner respectfully moves that this Court take any measure it deems proper to correct the injustice here complained of.

There are additional reasons why the denial of an evidentiary hearing worked injustice. The State Attorneys in the Respondent's "Amended Return", paragraph 4 (R. Doc. No. 35) admitted that the State on the trial had in its possession "two" signed statements of Edith Springer dated July 28, 1949 and August 30, 1949, and in neither did she mention the marker plate numbers SS 404 that she testified to almost a full year later that she had seen on a Cadillac before the time of July 28, 1949, which witness and testimony was used by the State to make it appear that the petitioner had driven the Cadillac involved in the case. On cross-examination Springer was questioned about her prior knowledge of both marker plate numbers and the State on re-direct examination deliberately made it appear falesly and knowingly that Springer had known those plate numbers both and so had Springer testify, and therefore knowingly used perjured testimony now shown by this admission, and also knowingly suppressed vital and crucial evidence

both as to the Springer witness's credibilty and that would have proved that she had committed perjury on the trial. The marker plates SL 513 to which Springer also testified were never produced in evidence and their only relevance to the Cadillac in the case was based on Springer's testimony on the Marker numbers SS 404, those registered to the Cadillac involved in the case at the Hollywood Cafe. The state's whole "circumstantial" case was based on the Springer testimony, and therefore perjured evidence knowingly used as such.

The admissions of the State Attorneys on the Springer testimony were made in reply to this petitioner's Statement of Facts in his Original and Amended Petition for a Writ of Habeas Corpus, and paragraphs 9-12 therein (R. Doc. No. 4). Those admissions were sneaked in with the "Amended Return" of the Respondent, after Summary Judgment had been moved for on other claims and after the District Court had reserved decision. Thus while of record the State Attorneys admitted Claims three and four of the Petitioner's petition for a writ of habeas corpus, the District Court denied and dismissed the petition and rendered judgment in favor of the Respondent, cutting the petitioner off from relief on his claims of knowing use of perjured evidence and suppression of evidence. The District Court summarily cut the petitioner off from a hearing or any chance of a hearing on these issues also.

The State Attorneys admitted the petitioner's pleadings. These were verified pleadings supported by AFFIDAVITS (Appx. p. 19, 23). However, because of an arbitrary ruling by the District Court in favor of the Respondents by which the petitioner was cut off from a hearing, the State Attorneys are now in the ironical position of being able to claim that these issues involved here have now been previously decided on the merits, though obviously that is anything but the fact, and in fact quite the contrary. The State Attorneys have had favorable decisions handed to them by the District Court arbitrarily, without evidentiary hearings, and with no proof made of record whatever by the State Attorneys.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, petitioner prays that this Court grant rehearing of the Order of Denial, vacate the order, grant the petition and review the judgment and opinion below.

Respectfully submitted

FRANCIS C. SMITH
Box 100
Somers, Connecticut
06071

December 10, 1973

AFFIDAVIT OF PETITIONER

The petitioner Francis C. Smith hereby deposes on his oath that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

The petitioner Francis C. Smith further deposes on his oath that on the previous petition for a writ of habeas corpus in the case of U.S. ex rel. Francis Smith V. Reincke, Warden, 239 F. Supp. 887, before Judge Zampano of the U.S. District Court for Connecticut, the petitioner was given no evidentiary hearing in which he was allowed to produce evidence in support of any claim made therein and that the court-appointed attorney did nothing to substantiate by evidence any claim made by the petitioner and thereby of his own motion dropped many of the petitioner's claims, after which the petitioner tried to proceed without the said attorney but could not and was not permitted by the judges to do so.

The petitioner Francis C. Smith deposes further on his oath that to his best knowledge and belief every single claim made and submitted in his latest petition is based on a different set of facts than that previously presented, although the petitioner would claim as evidence any admissions made in the present petition that heretofore has been concealed by the state attorneys, such as

the admission now made by the state attorneys in the Respondent's Amended Return (R. Doc. No. 35) that the state witness Edith Springer had made two signed statements in neither of which did she mention the marker plate numbers SS 404 which she testified on the trial she had seen on a car driven by the petitioner long before she made and signed the two said statements.

The petitioner further deposes on oath that he does not know how U.S. District Judge Robert C. Zampano can hold that any issue now claimed and presented for a ruling was previously decided when there was no previous evidentiary hearing on any fact so that there is no possible way that His Honor can say that the same factual basis is involved as on any previous petition or that there was a decision on the merits on that factual basis.

State of Connecticut
County of Tolland

Francis C. Smith
Somers, Connecticut

On this 7TH day of December, 1973, personally Appeared before me FRANCIS C. SMITH the petitioner in this case, who, being first duly sworn on his oath, deposes to the truth of the foregoing affidavit.

Notary Public
My Commission Expires Mar. 31, 1975

STATE OF CONNECTICUT

COUNTY OF FAIRFIELD

My name is John H. Smith and I reside in the Town of Norwalk, Fairfield County, Connecticut, at 5 Hill Street. I am over eighteen years of age and I am a citizen of the United States of America and not a party to the within entitled action.

On the day of December, 1973, I served three (3) true copies of the within Petition for Rehearing, on the Attorney for the Respondents, Assistant State Attorney Richard F. Jacobson, by enclosing said copies in a sealed envelope with postage first-class thereon fully prepaid and placing the same in the United States mail at Bridgeport, Connecticut, addressed as follows:

Asst. State Attorney
Richard F. Jacobson
172 Golden Hill Street
Bridgeport, Connecticut
06604

I, John H. Smith, having been duly sworn, attest to the truth of the foregoing on my oath and under penalty of perjury, before , Notary Public, on this day of December , 1973, at Connecticut.

John H. Smith

To the truth of the foregoing, I , Notary Public, on this day of December, 1973, notarise and set with my seal of office.

Notary Public

Seal

APPENDIX

PARAGRAPHS 9-12 OF ORIGINAL AND AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

9. As part of its circumstantial case, the State produced one Edith Springer as its witness and she testified to having seen the petitioner driving on one occasion a gray Cadillac bearing marker plate numbers SS-404, those registered to the aforesaid gray Cadillac, and then later a gray Cadillac bearing marker plate numbers SL-513. The exact dates of these claimed observances were not given but they antedated the date of the crime charged by as much as a month and a half. The State claimed that the co-defendant George F. Lowden had been to the said Hollywood Cafe in this said Cadillac automobile on the night the New York State Police searched and impounded it.

10. On cross-examination of the state's witness Edith Springer she admitted not having known one set of the marker plate numbers SS-404 and SL-513 before the Grand Jury. On re-direct examination by the state's attorney, conducted in a highly leading and coaching manner, the state's attorney deliberately made appear to the jury that the witness Edith Springer had indeed known all along both marker plate numbers SS-404 and SL-513. The marker plate numbers SS-404 were of paramount importance and vital to the State's case since they were those registered to the said gray Cadillac automobile involved and impounded outside the said Hollywood Cafe in Brewster, New York.

11. Subsequently, after the petitioner's conviction and sentence of death, the said state's witness Edith Springer sent a letter to Superior Court Judge Quinlan, confessing and admitting perjury against the petitioner in his trial. A petition for a new trial was made, and heard by Judge Murphy of the Connecticut Superior Court. At that hearing the state's attorney submitted to Judge Murphy for his examination "two" signed statements

by Edith Springer, one dated August 1949, and the second dated about a month later. Judge Murphy in his Finding held that in neither of these "two" signed statements had state 's witness shown the slightest knowledge of the vital marker plate number SS-404. Edith Springer gave her trial testimony on the basis of these signed statements, and in fact the second one was taken by Lt. Hanesovsky, none other than the chief investigator for the state's attorneys, their own agent. Nevertheless on the petitioner's trial these "two" signed statements were supressed by the state's attorneys while they deliberately lead the jury to believe that indeed Edith Springer had known all the time the vital marker plate numbers SS-404.

12. The state also offered the owner of the said gray Cadillac as a witness, one Freid. Freid testified that his car had been stolen "sometime" in June, with no date of the alleged theft given. The petitioner had been driving a gray Cadillac "Fleetwood" from the later part of May to July 4, 1949 to a small summer resort operated by William Peatt at Lake Mamanasco in Ridgefield, Connecticut. Peatt testified that he looked over and discussed with the petitioner the gray Cadillac that the petitioner was driving and which at the time was but a few feet away and which the petitioner pointed out to him as a "Fleetwood" Cadillac while they were discussing this make of Cadillac and its various virtues. The Freid Cadillac was not a "Fleetwood" cadillac automobile.

(R. Doc. No. 4)

AMENDED RETURN TO WRIT
OF HABEAS CORPUS
U.S. DISTRICT COURT

And now comes Carl Robinson, Warden of the Connecticut Correctional Institution at Somers, respondent in the above entitled cause of action and amends his return as follows:

3 and 4 As to page 13, Allegation 1:

The state's case was predicated on the proof of murder in the first degree in that the petitioner committed willful, deliberate andpremeditated murder. This issue was decided in State V. Smith, 138 Conn. 196, 201-202, and Uninited States V. Reincke, 239 F. Supp. 887, 891-892.

As to page 13, Allegation 2:

At the trial the state apparently submitted as evidence articles found in the gray Cadillac solely to establish the presence of the petitioner at the scene of the crime, i.e. the Indian Harbor Yacht Club in Greenwich. To substantiate the conviction for willful, deliberate and premeditated murder the state did not have to prove that these sundry articles were obtained by commission of an unlawful act. This issue was likewise decided in State V. Smith, 138 Conn. 196, 201-202, and United States V. Reincke, 239 F. Supp. 887, 891-892.

As to page 13, Allegation 3:

Once again this claim seeks to raise the allegation that the State suborned perjury in the testimony of Edith Springer. This isuue was fully discussed in State V. Smith, 139 Conn. 249; United States V. Reincke, 239 F. Supp. 887, 896-897; and United States V. Reincke, 354 F. 2d 418, 421.

As to page 13, Allegation 4:

This concerns the claim that the State suppressed or withheld evidence at the trial of the petitioner which would have been favorable to the defense. This assertion arises from the two pre-trial statements given by Edith Springer. One was dated July 28, 1949 and the second one August 30, 1949. These statements contain a reference only to license plate SL513. At the trial Edith Springer

stated that in addition she had seen the gray Cadillac when it also bore license plate number SS404. This issue was thoroughly reviewed in Smith V. State, 139 Conn. 249; United States V. Reincke, 239 F. Supp. 887, 896-897; and United States V. Reincke, 354 F. 2d 418, 421.

As to page 14, Allegation 5:

This challenges the drafting of the Indictment. This claim was reviewed and rejected in United States V. Reincke, 239 F. Supp. 887, 891-892.

As to page 14, Allegation 6:

This claim purports to raise the same issue asserted in Allegation 1 and 2 on page 13. Apparently the petitioner is under the misapprehension that he was charged with felony murder, not willful, deliberate and premeditated murder. Since the petitioner was not charged with felony murder there was no need whatsoever for the State to prove the commission of a felony.

As to page 14, Allegation 7:

The allegation again seems to assume that the petitioner was charged with felony murder. Insofar as it attacks the charge on premeditated murder this issue was decided in State V. Smith, 138 Conn. 196, 201-202. The form of the indictment was upheld in United States V. Reincke, 239 F. Supp. 887, 891-892.

As to page 14, Allegation 8:

The assertion that Section 8350 of the 1949 Connecticut General Statutes is constitutionally void due to vagueness was never raised before the State Courts or the federal Courts. Therefore there still exists a state remedy which has not been exhausted by the petitioner.

As to page 14, Allegation 9:

The additional sentence which the petitioner refers to was imposed in the Superior Court in Hartford on July 28, 1967. After a plea of guilty to the charge of Escape from State Prison the petitioner was sentenced to not less than three years nor more than seven years in State's prison to run consecutively with his life sentence.

Respectfully submitted

Carl Robinson, Warden
Connecticut State Prison
Respondent

By:
Richard F. Jacobson
Richard F. Jacobson
His Attorney

(Copy to Petitioner)

Richard F. Jacobson